UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PARKWAY FLORIST, INC.,

and **Case 06–CA–209583**

JO ANN VAUGHN, an Individual.

PARKWAY FLORIST, INC.,

and **Case 06–CA–217020**

PAUL CAVALERO, an Individual.

Decision and Recommended Order

DAVID I. GOLDMAN
Administrative Law Judge

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DECISION

INTRODUCTION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves a small owner-operated floral shop with a few employees—two full-time and two to four part-time employees and some casual employees paid in cash.

After a sharp argument on a Friday afternoon in October 2017, between the owner and two employees, prompted by the preparation of a flower order, one of the employees was fired the following Monday morning. In early November 2017, she filed an unfair labor practice charge with the Regional office of the National Labor Relations Board (Board) alleging that her discharge violated the National Labor Relations Act (Act). In December 2017, the owner asked but failed to learn from an employee whether employees were cooperating with the Board's unfair labor practice investigation. The second employee involved in the October argument had provided an affidavit to the Board as part of its investigation, although there is no direct evidence that the owner knew of this. In January 2018, the owner reduced this second employee's work hours by one-day a week, allegedly based on slow business sales. In March 2018, he was terminated for a combination of slow store sales and declining punctuality in his work. He filed an unfair labor practice charge in March 2018. In April 2018, the owner again allegedly asked an employee if she had heard from the Board or from either of the two discharged employees regarding the Board.

All of this happened, but whether it offends the Act is a different question. The General Counsel contends that the discharges, the reduction in hours, and the questioning about the Board cases all violate the Act.

As discussed herein, under the circumstances, it is clear that the owner's December 2017 questioning of an employee about whether she or others were cooperating with the Board's investigation violates the Act's precedents. As further discussed herein, I do not reach the issue of whether the April alleged interrogation violated the Act, as a finding on that allegation would not materially affect the remedy in this case.

However, as also discussed herein, I recommend dismissal of the reduction-in-hours and discharge allegations. The evidence is lacking that employee conduct protected by the Act motivated the reduction in hours or the discharges. Indeed, the lack of evidence is reflected in the labyrinthian arguments resorted to by the General Counsel. These arguments repeatedly substitute speculation, unwarranted demands for adverse inferences, and the missteps of an unsophisticated Respondent, for tangible evidence and reasonable inferences of employer conduct violative of the Act. I will recommend dismissal of all but the interrogation allegation.

STATEMENT OF THE CASE

On November 8, 2017, Jo Ann Vaughn filed an unfair labor practice charge alleging violations of the Act by Parkway Florist, Inc. (Parkway Florist), docketed by Region 6 of the National Labor Relations Board (Board) as Case 06–CA–209583. Based on an investigation into this charge, on January 29, 2018, the Board's General Counsel, by the Regional Director for Region 6 of the Board, issued a complaint and notice of hearing in this case. Parkway Florist filed an answer denying all violations on February 7, 2018. An amendment to complaint was filed June 14, 2018. An answer to the amendment to the complaint was filed June 18, 2018, and an amended answer to amendment to complaint filed July 12, 2018.

On March 22, 2018, Paul Cavalero filed an unfair labor practice charge alleging violations of the Act by Parkway Florist, docketed by Region 6 of the Board as Case 06–CA–217020. A first amended charge was filed in this case on April 16, 2018, and a second amended charge filed May 25, 2018. Based on an investigation into this charge, on June 18, 2018, the Board's General Counsel, by the Regional Director for Region 6 of the Board, issued a complaint and notice of hearing in this case. Parkway Florist filed an answer denying all violations on June 20, 2018, and an amended answer on July 12, 2018.

On June 18, 2018, the Regional Director issued an order consolidating cases 06–CA–217020 and 06–CA–209583.

A trial in this matter was conducted on July 30, 2018, and September 6, 2018, in Pittsburgh, Pennsylvania. At the commencement of the hearing, counsel for the General Counsel moved to amend the complaints to reflect the proper spelling of Vaughn's first name, certain jurisdictional allegations regarding the Employer, and an amendment regarding the description of the employer conduct alleged as to Cavalero. The Respondent did not object to the motion, it was granted, and the Respondent amended its answer in response.

Counsel for the General Counsel and the Respondent filed posttrial briefs in support of their positions by October 11, 2018.

On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

At all material times, Parkway Florist has been a corporation with an office and place of business in Pittsburgh, Pennsylvania, and has been engaged in the retail and non-retail sale of floral arrangements and related products. In conducting these operations at its Pittsburgh facility, Parkway Florist annually, purchased and received goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. At all material times, Parkway Florist has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

A. Background

Parkway Florist is a floral shop in Pittsburgh, Pennsylvania, owned and operated by Cheryl Bakin. Parkway Florist sells a variety of floral products including flowers and plants, and provides event-planning services for weddings and other events. Parkway Florist occupies a corner of an old warehouse building on the first and second floor. The first floor entrance opens into a design area, cashier, restroom and kitchen. On the second floor is space for appointments with clients, Bakin's office, and a workspace for social media coordinator. A parking lot runs parallel to the building, extending approximately 100 yards and beyond the portion of the warehouse building occupied by Parkway Florist.

Cheryl Bakin is the sole supervisor of Parkway Florist, and is engaged in all aspects of the work performed at Parkway Florist.

Charging Party Jo Ann Vaughn began working for Bakin in January 2017, and typically worked Mondays, Wednesdays, and Fridays, 9 AM to 3 PM, as a shop assistant. Her work involved processing flowers from wholesalers, taking orders, and waiting on customers, among other duties. Vaughn also occasionally worked additional hours for events such as weddings. Vaughn was terminated on October 23, 2017.

Charging Party Paul Cavalero worked full-time as the floral designer for Parkway Florist beginning July 6, 2016. Cavalero's hours were reduced by one-day a week on January 5, 2018, and he was terminated on March 9, 2018.

Generally, in addition to work performed by Bakin, at all material times Parkway Florist employed a full-time floral designer (Cavalero), a social media and marketing coordinator (Kaydi Gratzer), and a few part-time employees depending on the season, including Vaughn and Alexandria Chisholm, a part-time employee since 2011, who worked more frequently in summers when not in school. In addition, Parkway Florist used a delivery driver and sometimes other employees who were "casual" employees and sometimes paid in cash.

The employees' relationship with owner Cheryl Bakin

As referenced above, Charging Party Vaughn began working for Parkway Florist in January 2017. Vaughn testified that while her and other employees' relationship with Bakin was good for many months into her employment in 2017, in late August or early September, coincident to the start of the busy wedding season, Bakin became a more difficult boss. Vaughn described Bakin as becoming increasingly abrupt, gruff, rude and "just difficult to deal with." Vaughn described Bakin as quick to correct other employees in their work, quickly growing angry when she thought employees were not doing a task correctly and slamming items on the counter. She indicated that Bakin's ire was particularly directed at Cavalero.

Other employees endorsed Vaughn's observations. Cavalero testified that Bakin would get "frustrated or agitated," and that "[s]he would talk down to you . . . . People were afraid to ask her questions."

Kaydi Gratzer, worked part-time and later full-time for Parkway Florist for nearly 5 years before resigning without notice on March 3, 2018. Gratzer testified that Bakin would sometimes yell at employees, particularly Cavalero, if she was displeased.[1]

Other employees testified to Bakin's "snippiness" but were far less critical: Chisholm testified that she and other employees occasionally talked about how "when Cheryl gets stressed, she can get a little snippy," which, Chisholm explained, meant "just like tense, stressed, kind of flustered." Chisholm testified that she told other employees that they should not take Bakin's actions

[1]Gratzer's resignation letter complained about the "high stress," "[l]ack of feedback," "unclear expectations," and lack of opportunity for advancement in the job. Bakin wrote a response letter to Gratzer, which, along with Gratzer's final pay and vacation check, included a rebuttal of Gratzer's complaints and some complaints of her own about Gratzer.

> personally, that it really didn't have anything to do with them, it was just that this business is Cheryl's livelihood and, therefore, she takes it very seriously and wants the best for both herself, her employees and her company and that can get overwhelming.

At trial the General Counsel made a point of eliciting evidence that employees, specifically Vaughn, Cavalero, and Gratzer, repeatedly talked among themselves in the Fall of 2017, about Bakin's attitude and verbal treatment of them. However, the record is also clear that they never discussed the matter with Bakin or otherwise confronted or alerted her about it. There is also no evidence that Bakin overheard them or was aware of their discussions about her. On one occasion the employees designated Vaughn to raise the issue with Bakin, but when she found herself alone with Bakin driving to a floral job at a wedding in mid-September, Vaughn could not bring herself to confront Bakin and simply told Bakin that the employees

> wanted her to do well because if she does well, we were all going to do well, that we were here to help her and we wanted to be team players and we were there to support her and help her.

The October 20 Incident

Bakin described Friday, October 20, 2017, as an extremely busy and stressful afternoon with four weddings the next day. Gratzer had been sent downtown to pick up flowers from a wholesaler. Chisholm was upstairs working on paperwork related to deliveries. Vaughn and Cavalero were downstairs. Cavalero was at a work counter preparing an arrangement. Vaughn was at another work counter preparing flowers for an upcoming wedding the next day. Bakin had just returned from a work errand and was downstairs at a desk with her laptop open and eating a sandwich she had brought back to her work bench.

While going through flowers, Vaughn noticed that the white hydrangeas that were going to be used for the wedding were going bad. Vaughn thought they had brown spots and some were going limp. Vaughn told Bakin who "snapped and said she was aware and that Kaydi [Gratzer] was already downtown picking up other ones and that [Vaughn] should not worry about it."

Vaughn returned to going through the flowers and about 15 minutes later began sorting Gerber daisies for the wedding. Vaughn believed the Gerber daisies were also going bad. According to Bakin, Vaughn raised concerns about the daisies and Bakin told her to cut them and put them in water and that Bakin would check them in an hour to determine if they were useable. Vaughn essentially corroborated this account, testifying that when she asked Bakin about the daisies, Bakin "snapped at [her] again and said, just cut them and put them in water."[2]

Vaughn began to do so and, as she testified, upon picking up the daisies "noted that the stems were gelatinous and slimy." Vaughn testified that she called Cavalero over from his work bench and asked him whether he thought the daisies looked normal to him. He came over from

[2]Cavalero told a slightly different story: he said that Vaughn asked *him* about the daisies and *he* raised the matter with Bakin. According to Cavalero, Bakin said that "I have already ordered those twice because of color. I can't afford to order them again. Make them work." Cavalero testified that he raised the issue of the daisies with Bakin, and that he told Vaughn to cut the flowers and put them in warm water. Although the differences in the accounts are not material, I credit Bakin and Vaughn's more consistent account.

his workbench to look at the daisies. Cavalero testified consistently with this, saying that Vaughn told him she thought the stems were "slimy" and that he went to her workbench to look at them.

Bakin testified that:

> I looked across the room at [Vaughn's] bench . . . and I see that she has called Paul [Cavalero] over and she's got him engaged in a conversation about the Gerbera daisies and there wasn't any need for any conversation. She just needed to do what I asked her to do. . . . We all had a lot of work to do that day. . . . It made me angry. They were wasting time fooling around. . . . I instructed Jo Ann [Vaughn] just to simply do what I asked her to do, which was to reprocess the Gerberas, and yelled at Paul to get back to his workstation and the work that he was assigned to do and he started yelling at me. I yelled back and he yelled more.

This description is essentially consistent with Vaughn and Cavalero's accounts, although Bakin's version left out the profanity (both hers and Cavalero's). According to Vaughn, Bakin

> started screaming and yelling and told us two to shut the fuck up and just do what we were told and there was no reason that the two of us needed to be fucking talking.

Cavalero testified that Bakin said, "Shut the fuck up about the Gerberas. I don't want to hear any more about the Gerberas," and moved from her desk to be next to Vaughn and Cavalero.

Cavalero put his hand on Bakin's shoulder, which appeared to enrage Bakin. He described Bakin as "screaming, top of her lungs" and yelling in his face. Cavalero began to yell at Bakin, reproaching her for yelling, arguing that he worked hard and comes in on days off. The two yelled back and forth for a while, with Bakin declaring that "she'll yell if she fucking wants to." Cavalero testified that he said,

> Oh, no. You're not going to be fucking rude to me. I bust my ass for you. I give up my days off. I work when you need me to. You're not going to be fucking rude to me.

Chisholm, who was working upstairs, heard Cavalero say something to the effect of "Cheryl, I need a minute, you can't treat people this way, I work my fucking ass off for you."

At that point, Cavalero—who described himself as "a little bit out of control"—went outside into the parking lot. Bakin returned to her work, moving flowers and slamming flower buckets roughly on the counters. Vaughn, who had been silent in response to Bakin yelling at her and Cavalero, and who had remained silent during the ensuing argument between Cavalero and Bakin, began tidying up, picking up flowers from the counter and floor. While doing this, Vaughn testified that she told Bakin that "we ask each other questions and not her because this is the type of responses that we get." Chisholm, who was upstairs, did not report hearing this, but Chisholm overheard Bakin say: "I need you to shut up and do your work."

Soon thereafter—but not immediately, perhaps five or ten minutes later—Bakin told Vaughn to get her stuff and go home. According to Bakin, "I instructed her to finish processing the Gerbera daisies and that's all of the work that I would have for her that day." This was at about 2 PM. Normally, Vaughn worked until 3 PM. Vaughn left and exited to the parking lot,

where she found Cavalero. They discussed what had happened. In a few minutes Gratzer returned to the shop and the three discussed the incident in the parking lot.

B. Vaughn's discharge

On the Sunday morning following the Friday argument—October 22—at approximately 9:30 AM, Bakin received a text message from Vaughn. It stated:

> Good morning. . . [.] I feel that I am a good employee. Im [sic] always early & work hard. The way I was treated Friday was completely inappropriate. It is not ok w me.

Bakin responded with the following text:

> I do not discuss workplace matters via text message.

Vaughn responded:

> Well after Friday I don't feel comfortable as being screamed at isn't something that's acceptable.

Bakin testified about the texts:

> On Sunday morning at approximately 9:30 or 9:35 in the morning I received a text message, ... from Jo Ann. I responded to the text message by simply saying that I don't discuss personnel matters via text message. I received another text message from her that basically said that she was—after Friday she was not comfortable in the working environment. She did not ask for a meeting. She did not ask if she could speak to me. That was the sum gist of the text message, and I really wasn't sure how to take that text message.

On Monday morning, Vaughn returned to work. When she entered Parkway Florist at approximately 8:58 PM she went directly to the bathroom. When she exited the bathroom, Bakin was waiting with a check for her. Bakin, who said she was "reading into [Vaughn's] text message," told Vaughn, "Here is your last paycheck. There is no more work for you here." Vaughn then left. Bakin provided no discharge letter, notice of discipline, or other official notice of termination.

Analysis of the Vaughn discharge

The General Counsel contends that the Respondent discharged Vaughn for engaging in protected concerted activity, an offense that violates Section 8(a)(1) of the Act.

To begin, I have no trouble accepting the General Counsel's view, and I find, that the employees' concern with and discussions among themselves during the Fall of 2017, about Bakin's temper towards them and her temperamental management of the flower shop amounted to protected and concerted activity. At the same time, there is zero evidence that Bakin knew anything at all about this protected and concerted activity. It was discussed only among the

employees, they feared talking to Bakin about the subject, and the one time they set about to informally nominate Vaughn to raise it with Bakin—it did not happen.[3]

Thus, as of October 20, Bakin had no knowledge of any concerted and protected activity over her "management style." Given this, the only issue is whether Vaughn was discharged for engaging in protected and concerted activity on or after October 20.

Here, it is important to be precise: the only thing that Vaughn did between October 20 and 23, that the General Counsel contends was protected concerted activity was Vaughn's statement to Bakin, after the argument and after Cavalero left the building, that "we ask each other questions and not [Bakin] because this is the type of response we get." See, GC Br. at 36–37.

Thus, the General Counsel does not contend that Vaughn's seeking of the assistance of Cavalero to figure out what to do with the Gerber daisies was protected activity. Nor does the General Counsel claim that Vaughn's weekend text exchange with Bakin constituted protected and concerted activity. Moreover, while the General Counsel argues (as discussed below) that Cavalero was engaged in protected activity when he engaged in the screaming match with Bakin on October 20, the General Counsel does not contend that Vaughn was discharged for Cavalero's conduct or that Vaughn was engaged in protected concerted activity generally during this argument. I have carefully read the General Counsel's extensively-argued brief—those claims are absent. As argued by the General Counsel, the only thing that Vaughn did that brings the events of October 20 and the following weekend into the realm of protected and concerted activity is the one statement by Vaughn to Bakin after Cavalero left the building.[4]

As the General Counsel contends (GC Br. at 37–42), Vaughn's discharge must be analyzed under a *Wright Line* framework, the Supreme Court-approved analysis in for all cases

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[3]The General Counsel appears to acknowledge this. Thus, in reference to Vaughn's discussion with Bakin on the way to a wedding venue in mid-September, the General Counsel explains that

> Vaughn intended to address with Bakin the atmosphere of anxiety in the shop caused by Bakin's harsh temperament. Ultimately, Vaughn was only able to muster the courage to address this concern by assuring Bakin that her employees were team players and 'were there to help her and support her.'

(GC Br.at 30) (transcript citations omitted).

[4]I have credited Vaughn's statement. But I confess I struggled with it. It makes some sense that Vaughn would say this to Bakin. Bakin's temper had been on Vaughn's mind for some time. However, Bakin did not recall hearing it. Of course, Bakin is a highly interested witness and adverse to the General Counsel. Notably, Chisholm, one of the few in this trial who appeared to take no side in this fight, also did not hear the alleged comment, although she heard other comments by participants in the argument. The General Counsel bolsters the testimony with the corroborative testimony of Cavalero and Gratzer, neither of whom heard Vaughn say this to Bakin—they were not present—but each of whom asserted that in the parking lot after the incident, Vaughn reported that she had said something to that effect to Bakin. Something about their common recitation of this point by Vaughn in the parking lot left me uneasy, as did Counsel for the General Counsel's argument on brief (GC Br. at 31 fn. 34) that the parking lot testimony was not hearsay, after assurances at trial—in response to specific hearsay objections—that this testimony was not being offered for the truth of the matter asserted (Tr. 292, 293, 325).

alleging violations of Section 8(a)(3) or 8(a)(1) turning on employer motivation. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). See, *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis); *General Motors Corp.*, 347 NLRB No. 67 fn. 3 (2006) (inadvertently not reported in Board volume) ("*Wright Line* applies to all 8(a)(3) and 8(a)(1) allegations that turn … on employer motivation"); *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 349 (2006) (applying *Wright Line* analysis to allegation that employer discriminated against employee based on protected activity).[5]

In *Wright Line*, the Board determined that the General Counsel carries his burden by persuading by a preponderance of the evidence that employee protected conduct was a substantial or motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole.

Under the *Wright Line* standards, this burden is typically met by showing the employee engaged in protected activity, employer knowledge of that activity, and animus on the part of the employer towards protected activity. *Cayuga Medical Center*, 366 NLRB No. 170, slip op. 1 fn. 1 & slip op. at 30 (2017); *Dish Network*, 363 NLRB No. 141, slip op. at 1 fn. 1 (2016). The Board also sometimes formulates the third prong as a demonstration that the animus contributed to the adverse employment decision. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999).

Such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel's showing of unlawful motivation, can avoid the finding that it violated the Act by "demonstrat[ing] that the same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089.

In this case, as referenced above, Vaughn's October 20 declaration to Bakin that "we ask each other questions and not [you] because this is the type of responses that we get"—constitutes protected concerted activity. It was directed to Bakin, so clearly she knew about it. Hence, the first two prongs of the General Counsel's *Wright Line* test are easily satisfied.

More difficult, is the third prong. What is the evidence of hostility to protected activity on which the General Counsel is relying? What is the evidence that hostility contributed to the adverse action taken against Vaughn?

The General Counsel proposes two answers. The first is timing. The Board has long recognized that unexplained timing of adverse action can be indicative of unlawful animus. *Electronic Data Systems,* 305 NLRB 219, 220 (1991), enfd. in relevant part 985 F.2d 801 (5th Cir. 1993); *North Carolina Prisoner Legal Services*, 351 NLRB 464, 468 (2007), citing *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004).

As the General Counsel points out, Vaughn was discharged just days—and the next weekday—after the October 20 incident in which she voiced protected and concerted sentiments to Bakin. However, under the circumstances this observation adds little to nothing to the General Counsel's case. Vaughn's alleged protected activity on Friday October 20, was an incidental part

[5] I note that the General Counsel makes no claim that this case presents a situation where an employer disciplined an employee for either a mistaken or accurate belief that the employee engaged in misconduct committed during the course of protected activity. See, *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964); *Roemer Industries, Inc.*, 362 NLRB No. 96 (2015); *Atlantic Steel*, 245 NLRB 814, 816 (1979).

of the events before the Monday October 23 discharge. The nonprotected events better explain the timing of the discharge without providing an inference of unlawful motive. In other words, the timing of Vaughn's discharge is more likely explained by Bakin's anger over Vaughn calling Cavalero over to her workdesk ("It made me angry. They were wasting time fooling around"), which precipitated Bakin's angry chastising of Vaughn and Cavalero, which led to Vaughn's text exchange with Bakin over the weekend, which Bakin testified that "I really wasn't sure how to take." All of these events share close timing with the discharge and together provide the explanation for the discharge—not the one-sentence comment by Vaughn to Bakin on October 20. The General Counsel offers absolutely no evidence or argument that Vaughn's one-sentence comment played any role in the discharge decision. In this case, I do not accept that "timing" can be relied upon to prove or support the General Counsel's case. *Lou's Transport, Inc.*, 361 NLRB 1446, 1458 (2014), enfd. 644 Fed. Appx. 690 (6th Cir. 2016) (timing of employee's discharge is not suspicious even though it occurred on the same day as protected activity where it also occurred on the same day that the employer discovered that the employee had responded to an instruction to continue working by saying "f—k you"); *Rockwell Mining*, 367 NLRB No. 39, slip op. at 10 (2018) (timing not indicium of unlawful animus where nonprotected conduct by employee dictated timing).[6]

Other than this "timing" argument, the General Counsel rests this case on putative arguments about pretext, and relies upon them to supply the otherwise missing inference of discrimination. In this instance, the General Counsel fails to prove pretext, and indeed, at times appears, wrongly, to suggest that the burden is on the Respondent to demonstrate that its asserted reasons for its actions were pretextual. However, pretext must be proven, and the burden of doing so rests with the General Counsel. See, e.g., *New York Telephone*, 300 NLRB 894, 896 (1990), enfd. mem. 940 F.2d 648 (2d Cir. 1991).

In the first place, the General Counsel's pretext evidence is slight. The General Counsel claims that Bakin's failure to provide warnings or other progressive discipline before discharging Vaughn is evidence of pretext because it is supposedly a "departure from past practice." But this alleged past practice is composed exclusively of Bakin's careful documentation and formal warnings to exactly one past employee, a fulltime employee terminated for repeated and ongoing attendance problems in 2016. There is no such thing as a past practice that happened once before, to a full-time, not a part-time employee like Vaughn, who was terminated for chronic attendance-related problems. There is no evidence that this prior employee provoked a screaming match at work between Bakin and employees. Neither law nor logic permits the General Counsel to base an inference of unlawful motive for Vaughn's discharge based on this very different comparator from a year before.[7]

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[6]I reiterate that the General Counsel does not and cannot claim that this is a case where the employee was disciplined for misconduct committed in the course of protected activity. In such cases, "the Board does not consider such conduct as a separate and independent basis for discipline." *Goya Foods*, 356 NLRB 476, 477 (2011). Here, the protected conduct was raised—through a one-sentence statement—during the course of an otherwise nonprotected incident.

[7]The General Counsel also mentions that five months later Cavalero received a termination letter, but no notices and warnings, and cites that as evidence of a practice of providing termination letters. The obvious inference is that Bakin was (slightly) more formal in releasing full-time than part-time employees. There is no basis for inferring unlawful motive in Vaughn's discharge from the failure to receive warning, notice, and written account of the discharge. Right or wrong, Bakin was acting out of anger when she decided to discharge Vaughn and it is not an inference of unlawful animus that she provided no warnings, discharge letters, etc.

The General Counsel's remaining evidence of pretext is even more dubious. It rests on the peculiar claim that the Respondent pled "shifting defenses within Respondent's Answers." By this, the General Counsel means nothing more than that the Respondent counsel pled an affirmative defense asserting that Vaughn was terminated for repeated insubordination, failure to follow instructions, disruption in the workplace, and arguing with supervisory personnel, and pled another affirmative defense stating that "The Respondent interpreted Vaughn's text messages to mean that Vaughn was quitting."

Putting aside whether these defenses are truly inconsistent, their pleading does not provide evidence from which unlawful motive can be inferred. They do not prove pretext. They do not show "shifting" defenses. The General Counsel then faults the Respondent for not proving these defenses at trial, and demands an adverse inference on the subject (GC Br. at 42), but the General Counsel forgets that it is the government—not the Respondent—that bears the burden of proof of unlawful animus for the discharges, including proof of pretext. See, *New York Telephone*, supra. The Respondent's failure to prove one or another affirmative defense cannot be converted into affirmative evidence that—with virtually nothing else—proves the General Counsel's case that Vaughn's termination was unlawfully motivated. This case is a case-study of an alleged violation built on inappropriately applied evidentiary doctrines.

That's the sum of the General Counsel's case as set forth in an extensive (GC Br. at 26–43) analysis devoted to the allegation that Vaughn's discharge violated the Act. I do not believe that the General Counsel has met the *Wright Line* burden with regard to Vaughn's discharge. The direct evidence of animus is nonexistent.[8] There is no inference of animus reasonably to be drawn from the timing of the discharge or from evidence of pretext.

However, even assuming, arguendo, that the short—one sentence of—protected activity that Vaughn engaged in when she told Bakin that this is why "we ask each other questions and not her because this is the type of responses that we get"—has been shown to be one of the reasons or causes of her discharge, I believe the record as a whole demonstrates that Vaughn would have been discharged in the wake of the October 20–23 incident, even in the absence of her engaging in the protected activity of making this statement. Indeed, the record is clear that Bakin was frustrated with Vaughn's questions, and then extraordinarily angered over Vaughn stopping work and getting Cavalero "engaged in a conversation about the Gerbera daisies [when] . . . there wasn't any need for conversation." This led to the heated argument with Bakin cursing and yelling at Cavalero and Vaughn (and yelling and cursing by Cavalero of Bakin).

I also believe that Vaughn's weekend texts further upset Bakin and contributed to her decision to let Vaughn go. It seems that Vaughn wrote the texts expecting and looking for an apology, or for Bakin to defer in some manner. It is clear that Bakin did not see it that way. She viewed Vaughn as continuing the dispute and being unwilling to apologize or accept blame. Always quick to anger, this angered Bakin further. Unintentionally on Vaughn's part, her weekend texts standing her ground were not well-received by Bakin. Although guarded and oblique in her testimony, Bakin explained that the text messages indicated to her that,

[8]The General Counsel does not contend that the Respondent's subsequent interrogation of employee Chisholm about the unfair practice charge filed by Vaughn constitutes evidence of animus that supports the conclusion that Vaughn's discharge was unlawfully motivated.

> after Friday [Vaughn] was not comfortable in the working environment. She did not ask for a meeting. She did not ask if she could speak to me. That was the sum gist of the text message, and I really wasn't sure how to take that text message.

In her account of events, Bakin testified that she "was reading into [Vaughn's] text message" when she greeted Vaughn with her "last paycheck" and the admonition that "there is no more work for you here."[9]

The sum and substance is this: looking at this record as a whole I think it is more likely than not, and I find, that even in the absence of Vaughn's protected activity, Bakin would have still terminated Vaughn Monday morning.

Does any of this reflect well on Bakin? Some would not think so. Did Vaughn's actions warrant termination? Maybe not in the General Counsel's flower shop. But has it been proven that Bakin violated the Act by discharging Vaughn for protected and concerted activity? I do not think it has. And to the extent we assume that protected activity played a role in the termination, then I believe that the record evidence makes it more likely than not that Bakin would have discharged Vaughn even in the absence of the protected activity. I will dismiss the unlawful termination allegation of the complaint in case 06–CA–209583.

C. The December interrogation of Chisholm

Vaughn filed an unfair labor practice charge over her discharge on November 8.

Part-time employee and shop assistant Alexandria Chisholm learned about Vaughn's charge sometime in November when she was contacted by Eric Kelly from Region 6 who asked her to give an affidavit in the case. Chisholm testified that she "was confused" about whether she was required to provide a statement and asked Cavalero about it. Cavalero told Chisholm about the process of giving a statement. Chisholm declined to give a statement at that time. She told the Board agent that "I'm not going to give an affidavit unless I'm legally subpoened to do so." However, Cavalero gave an affidavit to the Board on November 27, and told his coworkers that he had done so upon his return to work the next day.

At some point during December 2017, Bakin approached Chisholm and, as Chisholm testified, "asked me if I had been contacted at all by the NLRB and if I had known if anyone else had been contacted." Chisholm also related that Bakin asked her "if I had heard if anyone else had been in contact with them, had involved themselves with them in any way."

Although Chisholm had been contacted, and although she knew Cavalero had given an affidavit to the Region, she denied to Bakin that she had any knowledge about it: "I basically just said I didn't know and I had no interest in being involved."[10]

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[9] I reiterate that the General Counsel does not contend that Vaughn's weekend texts to Bakin objecting to Bakin's behavior on Friday at the store constituted protected and concerted activity.

[10] Bakin agreed that she and Chisholm had a conversation in mid-to-late December 2017 regarding the NLRB—Bakin testified that Chisholm "advised me that she had been contacted by Eric Kelly from the NLRB and that she had refused to talk with him and told him that she didn't want to participate and she had nothing to say." Bakin testified that "I simply told her that this was a serious matter and that she could possibly be subpoened and if she was subpoened then she would have to appear and testify." While I credit Bakin's account in terms of what Chisholm told

Analysis of the Chisholm interrogation

The complaint alleges that Bakin's December questioning of Chisholm about her and other employees' cooperation with the Board's investigation was unlawful.

Of course, not every interrogation is unlawful. The question to be answered is "whether, under all the circumstances, the questioning would reasonably tend to coerce the employee at whom it is directed." *Rossmore House*, 269 NLRB 1176, 1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985). The Board has explained that "[i]n the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Westwood Health Care Center*, 330 NLRB 935, 939, supra at 940; *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). It is well settled that in evaluating the remarks, the Board does not consider either the motivation behind the remarks or their actual effect. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998). Rather, "the basic test for evaluating whether there has been a violation of Section 8(a)(1) is an objective test, i.e., whether the conduct in question would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and not a subjective test having to do with whether the employee in question was actually intimidated." *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000) (Board's emphasis), enfd. 255 F.3d 363 (7th Cir. 2001).

Under the circumstances, Bakin's questioning of Chisholm was unlawful. There was no lawful purpose for the questioning, which was initiated one-on-one, by the owner-operator and only supervisor of the Respondent and directed to a part-time employee. The questioning was not casual, but directed toward learning which employees were cooperating with the Board in the investigation of Vaughn's unfair labor practice charge. The fact that Vaughn's charge was over her discharge, which occurred after a heated and angry exchange between employees and Bakin, and overheard by Chisholm, only adds to the coercive tendency of the questioning. Notably, and not surprisingly, Bakin's inquiry was met with an evasive untruthful response by Chisholm who, in fact, did know that Cavalero had provided the Board with an affidavit. Such attempts by an employee to conceal knowledge of protected activity weighs in favor of finding an interrogation unlawful. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1183 (2011); *Evergreen America Corp.*, 348 NLRB 178, 208 (2006), enfd. 531 F.3d 321 (2008).

I further note that this case is very similar to *Management Consulting, Inc.*, 349 NLRB 249, 259 (2007). There the Board, applying *Rossmore House*, supra, found it was a violation of Section 8(a)(1) of the Act for an employer's project manager to ask an employee in a telephone call whether she had received a phone call from a Board attorney during the investigation of

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her about being contacted by the NLRB, and the advice she gave Chisholm, I credit Chisholm's testimony that she was approached by Bakin, that Bakin initiated the conversation, and that Bakin asked her if she had been contacted by the NLRB, and whether any others had been contacted by the NLRB. While still an employee, and originally hired because her mother works at a hotel for which Bakin often provides flowers, I found Chisholm a credible witness, based on her demeanor and the general tenor of her testimony. She appeared to be testifying truthfully, out of legal obligation rather than partisanship, and did not appear to be invested in the outcome of the hearing. I believe her testimony. In addition, her testimony is corroborated—both she and Cavalero testified that they subsequently discussed that Bakin had asked Chisholm about the NLRB investigation.

charges against the employer. The project manager also asked if the Board attorney had talked to other employees. The employee admitted that the Board attorney had called her but said she did not know if the Board attorney had talked with other employees. The Board found a violation, noting that the call was made for the purpose of gaining this information, and expressed no lawful purpose. The Board pointed out that the Respondent's contention that the project manager had a "friendly working relationship with employees" was irrelevant.

I find that under all the relevant circumstances, Bakin's questioning of Chisholm was violative of Section 8(a)(1) of the Act.[11]

I do not reach the General Counsel's contention (GC Br. at 45–46) that Bakin's inquiry about employees' cooperation with the Board was inherently coercive and that the circumstances need not be considered.

I also do not reach the General Counsel's allegation that Bakin again unlawfully interrogated Chisholm about the Board's unfair labor practice investigation in April 2018. It is unnecessary to reach the April allegation as the finding of this similar additional 8(a)(1) allegation would not materially affect the remedy.

D. The reduction in hours and subsequent termination of Cavalero

Cavalero worked as a floral designer at Parkway Florist from his hire in July 2016, until he was terminated on March 9, 2018. Cavalero was the only individual employed as a floral designer, although Bakin also performed floral design work. Cavalero was Bakin's highest paid employee.

Cavalero typically had Mondays off and therefore was not at the store on Monday, October 23, 2017, when Bakin terminated Vaughn. Cavalero and Bakin never spoke regarding their heated argument on October 20.

Payroll records substantiate Bakin's testimony that in November 2017, overtime hours were cut "pretty much" across the board "as much as possible" for all employees. There was still some overtime, and more so in December, but less than in September and October. Bakin attributed this to a decline in cash flow and sales.

Throughout the fall of 2017, after Vaughn's discharge, relationships at the shop continued as before. Bakin, in the view of Cavalero and Gratzer, remained temperamental, quick to anger, and difficult to work with. Cavalero and Gratzer provided each other with moral support and spoke frequently about Bakin's tenor and actions. However, there is no evidence that Bakin was aware of the employees' dissatisfaction with her actions and attitude toward them.

As referenced above, on or about November 28, 2017, Cavalero gave the Board an affidavit as part of Vaughn's unfair labor practice case. The next day Cavalero told other employees that he had given the affidavit, but he did not tell Bakin that he had given an affidavit. There is no evidence that anyone told Bakin, and Bakin denied it. As referenced above, at some time in or around mid-December, Bakin asked Chisholm whether anyone had been in contact with the Board, but Chisholm denied knowing.

[11] The record evidence does not speak to the precise date of the interrogation. Chisholm said it occurred "December-ish." Bakin testified that the conversation occurred mid-to-late December. I will use the date of December 15, 2017, as the date for the violation.

On January 5, 2018, Bakin gave Cavalero a letter advising him that for (at least) the following five weeks his hours would be reduced from 40 to 32 hours each week. The letter set forth Cavalero's hours and days off for the following six weeks, showing that on the sixth week (the week of Valentine's Day, which Bakin, as Bakin testified, is a very busy week for the floral shop) Cavalero was "tentatively" scheduled to return to five-days a week of work. Bakin's letter stated:

> The extremely cold weather has curtailed our business significantly. Until the weather warms up, and we start to see an improvement to overall sales, I have no choice but to reduce hours. Hours could be further curtailed if the business level continues to fall.
>
> Should business improve, then the hours will be restored to you.

At hearing, Bakin testified regarding the reduction:

> I had to reduce his work hours in order to reduce payroll and to make the payroll hours match the work that we had available. We had no weddings or special events at all scheduled in January that were foreseeable. It was a very, very, cold month in January. Our normal business in January is at least a couple of weddings, funeral work and things like that. The daily business wasn't there and that actually started to taper off about the last week of December. We could see the trend coming and we had to cut hours.
>
> Jo Ann Vaughn was already gone. Betsy Guifre had tenured her resignation. Our other part-time employee was Alex Chisholm. We used Alex the first week in January to help with Christmas teardown and then she got no hours at all forth next two or three weeks. So the only two employees that I had working were Kaydi Gratzer and Paul Cavalero.
>
> I cut Paul's hours by eight hours a week and if that hadn't helped minimize some of the pain I would have be forced to cut Kaydi's hours next.

The records submitted at trial show that total sales for January 2018, were down 22.6% from the same period in 2017, and down 7.2% in February 2018, compared to 2017. Fresh flower sales, which composed, by a factor of nearly 10, the largest component of sales, were down 21.8% in January 2018, compared to January 2017, and down 33% in January-February 2018, compared to January-February 2017. Wedding events brought in $1350 in January 2017, but only $25 in January 2018, a decline of over 98.2%. This continued in February 2018, when wedding sales brought in an additional $155.

Records show that Cavalero worked 32 hours for the five weeks following the letter, and 46.5 hours the week of Valentine's Day. After that, for the weeks ending 2/17/18, 2/24/18, and 3/3/18, Cavalero returned to a 32-hour-a-week schedule, although on Sunday, February 18, he participated in a photo shoot at the store that brought his hours to 36.5 for the week ending 2/24/18. Chisholm also worked fewer hours in this period. After working 24 hours the week ending 1/6/18, she worked 8 hours the following week, zero hours the week after that, 16 hours the week after that, and zero hours the week ending 2/3/18. She then worked 7 hours the week ending 2/24/18, and 8 hours the week ending 3/3/18. Only Gratzer, remained working a full 40 hours a week during this period.

On March 9, 2018, Bakin terminated Cavalero. The brusque termination letter provided to Cavalero stated:

> Dear Paul,
>
> Effective today, March 9, 2018, your position with Parkway Florist, Inc. is terminated.
>
> Enclosed is your paycheck for the week ended 3/10/18, your last week of work here. A separate check is also enclosed for 40 hours of Vacation Pay, which you earned in 2017 and is payable this year.

At trial, Bakin explained Cavalero's termination as follows:

> I had to make the very painful decision that I could no longer afford him. As I stated earlier, we had no events in January and none in February. We had one small event the first Friday of March and that was it. I didn't have the money to continue to pay him. So I had to let him go.

In response to Cavalero's application for State unemployment insurance, on March 20, 2018, Bakin submitted forms to the State listing the reason for Cavalero's separation as "Lack of Work" and "Permanent," explaining:

> Business slow-down [b]egan in Jan 2018; Slowdown Continues; Paul disregarded Start times; lunch breaks; Quitting times, etc. to get fired.

Cavalero was upset by the dismissal. The temper he showed during the previous October incident came through even more forcefully. Bakin's unrebutted testimony is that when she terminated Cavalero on March 9, he

> became very loud. He threatened me. . . . Verbally. Verbally threatened me. Told me that he would own my business and own my house. He was screaming, went outside. We have a parking lot in front of our store that is 19 about 50 to 60 feet wide. He was pacing back and forth between the store and the street screaming at someone on a cell phone.
>
> I had asked him, when I gave him the letter and his checks, to return my key to the store. He did not do that. I went to the door and asked him to please give me my key back and he screamed at me to not come near him. I was standing about 20 plus feet away from him and he took his key—my key for my store off his key ring and he threw it at me.
>
> And then someone showed up a few minutes later. I had picked up the key and gone back inside and I actually locked the door from the inside and a few minutes later someone showed up and picked him up.[12]

[12]Cavalero was in the hearing room for this testimony but did not testify in rebuttal. I credit Bakin's account of this incident.

Bakin testified that it was her intention, "when Paul [Cavalero] was terminated, to work through March and probably most of April by myself with a delivery driver and possibly somebody answering the phones." However, Bakin testified that the week after terminating Cavalero, her plans changed:

> I was notified by my primary care physician about a week after Paul was terminated that I had yet a third abnormal chest x-ray and there was a strong possibility that I was facing a diagnosis of lung cancer. I had some very, very hard decisions to make that had to be made quickly. I had commitments to a number of customers and I needed to get somebody in to work with me that could do for me what they needed to do while I went and had some medical tests done and they were able to determine what was really going on.

Bakin also testified that:

> On or about the 12th or 13th of March I was contacted by my PCP that my third lung x-ray was equally bad and getting worse and that they needed to schedule me for an immediate CT scan and other scans, because they suspected that I had lung cancer in my left lung and that this could not wait because the third x-ray of the spot that they were looking at that was supposedly cancerous was growing at an alarming rate and that was not something that I could put off or wait a while to have done. They would have preferred that I went into the hospital to have it done like tomorrow and that couldn't happen.

Bakin indicated that these medical issues changed her plans about doing the floral work by herself and waiting out the lull in business before hiring someone else:

> So I have a very serious illness hanging over my head. I am already a two time cancer survivor. So it's not a surprise to be facing cancer for a third time, but I can't give up. I just have to keep fighting.

Bakin explained:

> At the point that I got that phone call I had a hard decision to make. Do I immediately shut the business down right now, tomorrow shut it down or did I find someone who could come in at least on a temporary basis and help me operate the business until we figured out what I had or what I didn't have and what my options were.

Bakin testified that when she terminated Cavalero, she anticipated hiring someone part-time again toward the end of April. "The diagnosis that I was faced with just advanced that whole process."

Given her change of plans, Bakin testified that she "would have possibly called [Cavalero] back to work if he hadn't been so volatile and so absolutely nasty to me that day. He has a very volatile temper." Bakin testified that "I would have considered rehiring him except for the horrible way he behaved when he was terminated on March 9th." Instead, Bakin hired Chris Stewart as a floral designer, and he began work at the end of March, working full time.

Analysis

The General Counsel contends that the Respondent unlawfully retaliated against Cavalero when it reduced his hours of work in January 2018, and again when it terminated him in March 2018. The General Counsel argues that each of these adverse actions was unlawful retaliation for Cavalero's involvement in the Region's investigation into Vaughn's discharge—an 8(a)(4) and 8(a)(1) violation[13]—and, separately, retaliation for Cavalero's alleged protected and concerted activity—an independent 8(a)(1) violation. As discussed below, I dismiss.

The 8(a)(4) allegations

Section 8(a)(4) of the Act provides that it is an unfair labor practice "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." The proscription on discrimination under 8(a)(4) has been interpreted to include discrimination for providing a sworn statement to a Board field examiner investigating an unfair labor practice charge. *NLRB v. Scrivener*, 405 U.S. 117 (1972).

As referenced earlier in this decision, the Supreme Court-approved standard for cases turning on employer motivation is found in *Wright Line*, 251 NLRB 1083. This holds for motivation-based cases alleging violations of Section 8(a)(4). *American Gardens Management Co.*, 338 NLRB 644, 645 fn. 7 (2002) (endorsing application of *Wright Line* standard to 8(a)(4) allegations); *Verizon*, 350 NLRB 542, 546–547 (2007).

Applying *Wright Line*, it is clear that Cavalero's submission of an affidavit on November 28, 2017, as part of the Board's investigation into Vaughn's discharge, is the type of protected activity that is covered by Section 8(a)(4).

More difficult, is the claim by the General Counsel that the Respondent knew that Cavalero participated in the Board's investigation, or that his participation contributed to the decision to reduce his hours or to discharge him.

As the General Counsel argues, to satisfy the "knowledge" element of his *Wright Line* burden it is enough to show that the Respondent suspected or believed that the employee engaged in protected conduct—it is not necessary to prove that the Respondent knew of the protected conduct. See, e.g., *Kajima Engineering & Construction*, 331 NLRB 1604, 1604 (2000) (proof that employer suspected that employee engaged in union activity satisfies *Wright Line's* knowledge requirement). Moreover, it is well established that where there is no direct evidence, knowledge of an employee's protected activities may be proven by circumstantial evidence from which a reasonable inference may be drawn. *BMD Sportswear Corp.*, 283 NLRB 142 (1987), enfd. 847 F.2d 835 (2d Cir. 1988); *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996).

Here, the General Counsel concedes that no direct evidence supports the claim that the Respondent had knowledge of or suspected or believed that Cavalero had participated in the Board investigation into Vaughn's unfair labor practice case. Rather, the General Counsel contends that the Respondent's knowledge—or suspicion or belief in—Cavalero's participation

[13]Because any conduct found to be a violation of Sec 8(a)(4) of the Act would also discourage employees' Sec. 7 rights, it is also a derivative violation of Sec. 8(a)(1) of the Act. *Chinese Daily News*, 346 NLRB 906, 933 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

can be inferred indirectly. See, GC Br. at 53–56, 68. However, in my view, the alleged indirect indicia provide an unconvincing basis on which to infer knowledge or suspicion of, or belief in, protected activity.

First, the General Counsel relies upon the fact that in December 2017, Bakin unlawfully interrogated Chisholm, seeking to know whether she or other employees were assisting in the Board's investigation into the Vaughn discharge.

I do agree that Bakin's demonstrated interest in the question increases the possibility—at least a little bit—that she guessed of Cavalero's involvement. There are not many employees at this store, and Cavalero was present and a major participant in the October 20 argument. Perhaps Bakin believed Chisholm's (false) claim that she was not involved with the Board investigation and then guessed that Cavalero was. Perhaps. But I would not draw an inference of knowledge based on Bakin's interest in the subject—that would entail assuming precisely what the General Counsel needs to prove—and precisely what she was *not* told by Chisholm in the interrogation. In other words, it remains entirely speculative whether Bakin, having talked to Chisholm, and learned nothing, then guessed that Cavalero was involved with the Board's investigation into Vaughn's claim. Indeed, Bakin might or might not have guessed this *without* talking to Chisholm. Thus, the General Counsel relies on the interrogation to prove precisely a fact that it did not reveal. There is nothing added by the interrogation from which knowledge of Cavalero's participation in the investigation should be inferred.

Second, in still another version of the preceding argument, the General Counsel contends (GC Br at 53) that the Respondent's knowledge of Cavalero's cooperation with the Board can be inferred from the Respondent's June 20, 2018 answer to the complaint (GC Exh. 1(t) at ¶9). In the answer, filed by the Respondent's counsel, it was stated:

> Respondent had no idea that Paul Cavalero had given testimony to the Board in the form of an Affidavit, or otherwise. Cavalero never advised the Respondent that he had participated, in any way, in Case No. 06-CV-209583 and, *despite inquiry by Respondent's counsel as to the identity of witnesses whom had been interviewed, the NLRB investigation and NLRB counsel refused to provide such information*. Because Respondent was never aware that Cavalero had given testimony to the Board, it could not have engaged in any conduct towards him for that reason. [Emphasis added.]

The General Counsel contends that by admitting that the Respondent's counsel asked the NLRB counsel who had been interviewed, it should be inferred that the Respondent knew that it was Cavalero.

I give this version of "they asked so they must know" even less weight. As with Bakin's interrogation, counsel's interest in the Board's investigation, expressed to an unnamed government agent, was apparently rebuffed, and is not evidence of the opposite: that he otherwise learned of or suspected of Cavalero's involvement. Moreover, there is no evidence as to when counsel's inquiry was made. If it was not made prior to January 5, 2018, then it could not support a finding of the Respondent's knowledge of Cavalero's participation in the investigation at

the time his hours were reduced. Counsel for the General Counsel did not seek to adduce any testimony to clarify this issue.[14]

Third, the General Counsel contends that the timing of the reduction in hours—a few weeks after the interrogation—supports a finding that the Respondent knew that Cavalero had provided testimony to the Board. However, this is not compelling either, given that Bakin provides other reasonable explanations for the timing of the reduction in hours, and given, again, that the evidence is that Bakin did not learn of Cavalero's involvement with the Board through the interrogation.

And as to the March 9 discharge, neither the fact nor the timing of the Chisholm interrogation in December supports a finding that the Respondent knew of Cavalero's participation in the Board investigation, much less that this knowledge contributed to the decision to discharge Cavalero in March. It is highly attenuated.

Fourth, in a related timing argument, and still another one based on the Region's contacts with the Respondent's counsel, the General Counsel contends that an inference of knowledge of Cavalero's participation in the Vaughn investigation should be drawn based on the fact that the Region sent two emails to the Respondent's counsel, one on January 4 and one on January 5—the latter date being the same day that Cavalero was informed of the cut in his hours.

This is not probative evidence. Correspondence between a respondent's counsel and the investigating region is not unusual; one would expect that these two emails are a small sample of the email traffic between the Region and the Respondent's counsel during this case (and the representations of counsel suggest this is so, see Tr. 225). That the General Counsel selected and introduced into evidence the two emails that it sent in the Vaughn case at the same time of Cavalero's reduction in hours is unimpressive, even as a coincidence. Were these the only two emails the Region had ever sent to the Respondent's counsel, perhaps the coincidence would be more impressive. But no one claims that. Moreover, the content of these two emails does not advance the General Counsel's claims. The January 4 email is a one-sentence email from Region 6 Field Examiner Eric Kelly, asking for the locations in the Respondent's store where notices are normally posted, sought by Kelly "[f]or purposes of drafting a Settlement Agreement." The January 5 email, sent by Kelly to the Respondent's counsel at 2:40 PM that day is more substantive—it announces that the Director has determined that the charge has merit and states that a complaint will issue absent settlement, a matter that the email refers to as something "we discussed."

The General Counsel's suggestion is that these emails may have provided Bakin with suspicion of Cavalero's cooperation with the Board and led to the reduction in hours. Of course, the General Counsel elicited no evidence of the substance of the discussions between Counsel and the Board agent referenced in the email. The General Counsel elicited no evidence about when on January 5 (or before) Bakin made the decision to reduce Cavalero's hours. The General Counsel elicited no evidence from Bakin as to when Bakin learned that the Region had determined to issue a complaint in the Vaughn case. Without such evidence, it is sheer speculation that on January 5, when Bakin informed Cavalero that his hours were going to be reduced, that she already knew, or even that the Respondent's counsel knew, that the Region

[14] I further note that the General Counsel does not contend that the Respondent's counsel's inquiry was a violation of the Act.

was going to be issuing a complaint in the Vaughn case. It is further sheer speculation built on top of speculation that Bakin's knowledge led to the reduction in hours and even more speculation that the Region's decision to issue the complaint somehow provides evidence that Bakin knew of Cavalero's participation in the investigation.[15]

Finally, the General Counsel also contends that "[p]erhap most importantly," evidence of the Respondent's knowledge of Cavalero's "Board-related activities" (GC Br. at 53) may be inferred from the Respondent's response to Counsel for the General Counsel's subpoena duces tecum trial subpoena. That the General Counsel believes this may be his most important evidence speaks volumes as to the gossamer-like quality of his case.

This supposed indicium of knowledge is difficult even to explain. Counsel for the General Counsel served a subpoena duces tecum in conjunction with both case 6-CA-209583 (Charging Party Vaughn) and case 6–CA–217020 (Charging Party Cavalero) on the Respondent on July 6, 2018 (GC Exh. 3). In response, Bakin prepared and provided to the General Counsel a document, not anticipated by Board rules, entitled "Answers to the Subpoena of 7-16-18" (GC Exh. 4). In this document, Bakin sets forth interrogatory-like answers to the 15-paragraphs of requested documents set forth in the subpoena duces tecum (GC Exh. 3).

Paragraphs 8 and 9 of the General Counsel's subpoena duces tecum sought the following:

> 8. For the period covered by this subpoena, documents that pertain to Respondent's reduction in the regular and overtime working hours of its employees, including, but not limited to, correspondence with any employees or employees, text messages, internal notes, written memorializations of conversations, and documents reflecting the reasons of the subject reductions in working hours.
>
> 9. To the extent not covered by the request in paragraph 8, for the period covered by this subpoena, documents that in any manner pertain to Respondent's decision to reduce the working hours of its employee Paul Cavalero, including, but not limited to correspondence, text messages, internal notes, written memorializations of conversations, documents upon which Respondent relied in reaching its decision to reduce Paul Cavalero's working hours.

[15]The General Counsel tries to avoid the evidentiary problems posed by the lack of record evidence by claiming (GC Br. at 55–56 & ft. 49) that it was the Respondent's burden to establish these facts and that an adverse inference should be taken against the Respondent for failing to elicit them. This ignores—or more accurately, reverses—the precept that it is the General Counsel's burden to establish Bakin's knowledge of Cavalero's protected activity. The General Counsel cannot win this case by demanding adverse inferences to cover gaps in the evidence.

In response to these subpoena requests, Bakin's self-styled "Answers to Subpoena" listed, stated:

> 8. Copies of hours summaries are attached again.
> A sample Time sheet is attached.
> A Copy of the timesheet from the week ended 10/21/17 is attached.
>
> 9. Text messages from Joann Vaughn, as well as her Facebook videos and Facebook postings are entered into evidence here today.

The General Counsel argues that these answers by Bakin in this odd document, not provided for by the Board's rules, and not responsive to the subpoena request, constitute an admission, as it was authored by Bakin and submitted to the Region. But an admission of what?

It is unclear to what text messages or Facebook videos/postings Bakin's "Answer to Subpoena" refers. Although Counsel for the General Counsel went to some lengths to call Bakin as an adverse witness and establish the authenticity and Bakin's authorship of the "Answer to Subpoena," no questions were asked that would shed any light on the meaning of this answer. The only Facebook video that was discussed at trial was one that post-dated Cavalero's reduction in hours and the General Counsel successfully objected to its introduction into evidence. The Respondent placed two Facebook postings from Vaughn into evidence (R Exh. 2(a) & (b)), but these also postdated Cavalero's reduction in hours. The only text messages in evidence are the ones from Vaughn to Bakin on October 22, 2018. The General Counsel does not contend that they are protected by the Act.

The General Counsel's position is that Bakin's "Answer to Subpoena" "constitutes an admission that it [the Respondent] knew of Cavalero's Board activities or statements." It does no such thing. I am not entirely clear what Bakin meant by this answer. Perhaps it was a mistake. Perhaps there was probative testimony to be gleaned from it. But no questions were asked of Bakin about this document when the General Counsel called her to testify, other than authenticating it and establishing Bakin's authorship. If this is the General Counsel's "most important" evidence, the problems with the case are manifest.

This is all the General Counsel argues in terms of the Respondent's knowledge of Cavalero's cooperation with the Board in the Vaughn case. I find that the General Counsel has failed to show that the Respondent had knowledge of Cavalero's participation in the Board's investigation into the Vaughn case, and therefore the General Counsel has failed to meet his *Wright Line* burden. I dismiss the 8(a)(4) allegations on this basis.[16]

Moreover, even if one assumes, arguendo, that the General Counsel has made out a prima facie case of an 8(a)(4) violation, I would find that the Respondent has met its burden of establishing by a preponderance of evidence that it would have reduced Cavalero's hours and later terminated him, even in the absence of Cavalero's cooperation with the Board investigation.

[16]I note that in support of the 8(a)(4) allegation, the General Counsel does not claim that the Respondent's knowledge of Cavalero's participation in the Board investigation can be inferred based on the "small plant" doctrine."

First, I reject the General Counsel's suggestion that that the government's prima facie case is unusually strong, and, therefore, that the Respondent bears an unusually substantial rebuttal burden. To the contrary, I believe that, even granting, arguendo, the assumption that a prima facie case has been made, the General Counsel's prima facie case is unusually weak. "Of course, '[t]he weaker a prima facie case against an employer under *Wright Line*, the easier for an employer to meet his burden . . . of proving [the employer's action] would have occurred regardless of protected activity."[17] In this case, Respondent has met that burden.

Here, the Respondent's undisputed explanation (Tr. 364–368) for the reduction in hours is that business was off in early 2018 as compared to the same period in 2017, and down compared to December 2017. The sales figures provide evidence of that. See, supra. Moreover, as Bakin pointed out, Cavalero was her highest paid employee, and one of only two full-time employees. These facts support Bakin's credible testimony that her business judgment prompted her to reduce Cavalero by one-day-a-week to meet the needs of the business.

In response, the General Counsel relies on a dizzying counternarrative (GC Br. at 64–68) that, in essence is no more than sniping at the Respondent's business judgment. The General Counsel's contentions—that the Respondent did not establish that it needed to further reduce its payroll after another employee's resignation, that Cavalero was a more valued employee than Gratzer, that flowers sometimes go bad before they can be sold to customers and thus profit depends on which floral products are sold, that labor expenses factor into the overall cost of goods, that the Respondent failed to prove that it had no other economic choice but to terminate Cavalero—all of this amounts to an unconvincing questioning of the Respondent's business decisions, a matter, of course, to which the General Counsel brings no experience or standing. None of the General Counsel's arguments about the flower business provides reason to doubt the Respondent's plausible explanation for its actions.

The General Counsel also claims that the Respondent's explanation for reducing Cavalero's hours are a pretext, but I do not accept this claim. Noting that in a May 22, 2018 document that was (apparently inadvertently) provided to the Region (Tr. 251–252), Bakin stated that Cavalero's hours were reduced due a business slow-down and a "cash shortfall," the General Counsel claims that the Respondent failed to provide related subpoened documents. However, the General Counsel failed to prove that any documents related to "cash shortfall" owing under the subpoena were withheld or even what such documents would look like. In a closely related argument, the General Counsel contends that the Respondent failed to provide subpoened documents relating to "cash flow." However, the General Counsel failed to prove that any documents of any significance to "cash flow" had been withheld and, additionally, flatly failed to prove subpoena noncompliance. Tr. 354-362.[18]

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[17] *Sasol North America Inc. v. NLRB*, 275 F.3d 1106, 1113 (D.C. Cir. 2002) (court's bracketing and ellipses, quoting *Doug Hartley, Inc. v. NLRB*, 669 F.2d 579, 582 (9th Cir. 1982)); *Sysco Food Services of Cleveland*, 347 NLRB 1024, 1036 (2006) ("Where, as here, the General Counsel initially makes a showing that protected conduct was a motivating factor—but not a large factor—the Respondent's burden to show that the adverse action would have occurred in the absence of protected activity, is lighter").

[18] More fundamentally, I reject the General Counsel's approach. Thus, the General Counsel did not subpoena "cash flow" documents. Rather, the General Counsel served overbroad and vague subpoenas that put the burden on the Respondent to provide "documents that in any manner pertain to Respondent's decision to reduce the working hours of its employee Paul Cavalero" or "pertain to Respondent's reduction in the regular and overtime working hours of its

Similarly, with regard to the allegation that Cavalero's discharge was in violation of 8(a)(4), if we assume, arguendo, that the General Counsel met its *Wright Line* burden, the Respondent has provided enough evidence to demonstrate that it would have made the same discharge decision in the absence of Cavalero's cooperation with the Board's investigation into Vaughn's unfair labor practice case.

Bakin testified that she decided to terminate Cavalero because business was slow. In addition, it is clear from Bakin's testimony, but also from the State unemployment compensation forms she filled out on Cavalero, that Cavalero was let go not only because of lack of work, but also because of Bakin's dissatisfaction with his performance, particularly after the reduction in hours in January. As evidenced in the unemployment compensation papers she filed on March 20, the slowdown in business *and* Cavalero's lack of punctuality were reasons he was let go.

The General Counsel's arguments for finding pretext in the Respondent's explanation for terminating Cavalero are relentless but unconvincing. The General Counsel's remarkable and inexplicable zeal in prosecuting this case cannot make up for the dearth of evidence.

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employees." When Bakin raised "cash flow" (Tr. 353) as one of the reasons for the reduction in overtime in November 2017, the General Counsel objected and sought sanctions (Tr. 354; GC Br. at 62-63) on grounds that not *every* document that could inform an owner's view of cash flow had been provided. However, the Respondent did provide voluminous product comparison and sales and summary reports, which, Bakin testified, were her chief source for evaluating cash flow. The General Counsel complains that there are other marginal documents—such as a schedule of upcoming weddings and event orders, and a list of clients owing money—that were not provided. Under these circumstances, this is not sanctionable subpoena noncompliance. Subpoena requests that purport to require all documents "relating" or "pertaining" to a subject makes particularly bad candidates for charges of subpoena noncompliance based on the failure to provide marginal documents, where, as here, a respondent has gone to great lengths to attempt to satisfy its subpoena obligations. See, e.g., *Champion Pro Consulting Group, Inc. v. Impact Sports Football, LLC*, 2014 WL 6686727, at *4 (M.D.N.C. Nov. 26, 2014), citing *James Madison Project v. C.I.A.,* No. 1:08CV1323(GBL), 2009 WL 2777961, at *4 (E.D. Va. Aug. 31, 2009) ("a request for all documents relating to a subject is usually subject to criticism as overbroad since . . . all documents relate to others in some remote fashion. Such a request unfairly places the onus of non-production on the recipient of the request and not where it belongs—upon the person who drafted such a sloppy request") (unpublished) (internal quotation marks and citation omitted); See, e.g., *Bradley v. J.E. Val-Mejias, MD*, No. 00-cv-2395, 2001 WL 1249339, at *6 (D. Kan. Oct. 9, 2001) ("The use of the term 'pertaining to' often makes a discovery request overly broad and unduly burdensome on its face. Such a phrase often requires the answering party to 'engage in mental gymnastics to determine what information may or may not be remotely responsive'") (citation omitted); *Perez v. El Tequila LLC*, 2014 WL 5341766, at *1 (N.D. Okla. Oct. 20, 2014) ("omnibus discovery requests seeking all documents referring to, concerning, relating to are unlikely to be enforced by this Court. They are generally too vague and overbroad on their face and do not describe with reasonable particularity what is being sought")(internal citations, quotations, and ellipses omitted); *Aikens v. Deluxe Financial Services*, *Inc.*, 217 F.R.D. 533, 538 (D.Kan.2003) (request or interrogatory is unduly burdensome on its face if it uses the omnibus terms "relating to," or "regarding" with respect to a general category of documents); *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 197–98 (D.Kan.1996) (interrogatory seeking identity of all documents "pertaining to" was overbroad and unduly burdensome).

Thus, the General Counsel takes issue with Bakin's contention at trial that part of her reason for terminating Cavalero on March 9, was a decline in his work habits after his hours were cut in January. Bakin complained that after the reduction in hours Cavalero would often be tardy coming into work, take a long lunch, and begin cleaning up for the day too early. This is consistent with what Bakin told the state unemployment commission in March 2018 (even before Cavalero filed an unfair labor practice charge), and with what Bakin told her lawyer in a May 22, 2018 document that (apparently inadvertently) was provided to the Region. Tr. 251–252.

The General Counsel argues that Bakin's testimony about Cavalero's decline in punctuality is false testimony—and a pretext—but I do not agree. I recognize that Cavalero testified that he was not regularly late to work, and that Gratzer testified that she could not recall if Cavalero's lunch breaks or time spent clearing up his workstation at the end of the day changed after Vaughn was discharged in October 2017. I further recognize that Bakin never complained directly to Cavalero, docked him, or recorded her growing dissatisfaction with Cavalero's performance.

These, however, are not compelling points undermining Bakin's testimony. For one, I do not judge Cavalero's testimony as providing an accurate assessment of his work performance in January through March 2018. His expectations for himself undoubtedly differed from those of Bakin—indeed, Bakin's frustration and anger with employees' daily work performance—and particularly her ire at Cavalero—run through this whole case and carry great explanatory power for events that the General Counsel has decided to prosecute as unfair labor practices. I need not determine whether Bakin's assessment of Cavalero was wholly accurate or whether it was exaggerated. I believe she believed that Cavalero was not being conscientious and was too often late, slow to return to lunch, and too quick to stop working at the end of the day, and that this contributed to her decision to let him go in March.[19] Notably, Bakin had a lot of complaints about Gratzer too, but revealed none of them until Gratzer suddenly quit and then, somewhat gratuitously, Bakin sent Gratzer a letter outlining her frustrations with Gratzer's performance. The General Counsel harps on one employee—terminated at a time before any of the events in this case—as to whom Bakin tracked her attendance problems and gave her a warning letter before discharging her—as demonstrating a suspicious deviation from practice here, but that claim is unsupportable on this messy record of a sole owner-operator.[20]

[19] *McKesson Drug Co.*, 337 NLRB 935, 936 fn. 7 (2002 ("[i]n order to meet its burden under *Wright Line* (i.e., to show that it would have discharged the employee even in the absence of protected activity), an employer need not prove that the employee committed the alleged offense. However, the employer must show that it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged him").

[20] Counsel for the General Counsel misstates (GC Br. at 75) that this employee M. Stock, was warned and terminated in the Fall of 2017. It was the Fall of 2016, long before any of the events relevant to this case.

There is no pretext here. The General Counsel is missing the import of the evidence. This is not US Steel's personnel department at work. This is Ms. Bakin acting alone. And the General Counsel's wielding of rules of inference developed in the context of systematized and coherent system of labor relations is far-fetched on this record.[21]

There is also no merit to the General Counsel's claim (GC Br. at 83) that one can "easily infer" that Bakin terminated Cavalero in response to a March 8 email from the Region asking Respondent's counsel for commerce documents. The General Counsel also contends, more generally, that the General Counsel's notification to the Respondent that it was proceeding to complaint on the Vaughn discharge prompted the Cavalero discharge. Of all the General Counsel's kitchen sink of theories, I do wonder if the General Counsel's determination to prosecute the Vaughn case might have played any role in the Cavalero discharge. However, it is not something I am willing to assume, and I do not believe that there is evidence on which that inference can be based. And, of course, the fact that Vaughn made a Facebook video about her discharge on March 7, is an odd coincidence, but I am not going to assume that Bakin saw it by March 8, or reacted to it by firing Cavalero. My unwillingness to make that inference is bolstered by the fact that the General Counsel strenuously and successfully objected at trial to the Respondent's effort to introduce the video, arguing, among other things that it was irrelevant.[22]

Finally, the General Counsel questions the Respondent's rationale for the Cavalero discharge based on how quickly Cavalero was replaced. Thus, Bakin testified that when she laid off Cavalero, she planned to perform the dwindling floral design work that Cavalero performed, and wait for business to increase. However, a week later, on March 15, Bakin was corresponding with a potential replacement for Cavalero on an online job posting site, and at the end of March, employee Chris Stewart had begun work as a floral designer at Parkway Florist. Obviously, the replacement of Cavalero suggests that there was work for him to do.

[21]I am not saying that inferences do not apply in the context of a small employer, but as always, inferences may not be mechanistically applied but must be based on the record as a whole. In this case, on this record, variation in Bakin's documentation practices from one chronically absentee/tardy employee in 2016, to Cavalero in January-March 2018, simply shows nothing of interest, notwithstanding the General Counsel's effort to claim a deviation from practice from which we should infer illicit motivations. In the same vein, I reject the General Counsel's contention that the Respondent's answer to the Cavalero complaint, which alleges that Cavalero was laid off for economic reasons, conflicts in a meaningful way with Bakin's consistent testimony and the pretrial evidence that Bakin always maintained that economic factors and dissatisfaction with Cavalero's conduct played a role in the termination decision. I reject the General Counsel's contention (GC Br. at 81–82) that this is probative evidence of shifting rationales by Respondent.

[22]It does not behoove the General Counsel to attempt to rely on the video as evidence of the motive for Cavalero's discharge when it successfully kept the evidence out of the record. Further, the General Counsel's effort to rely on Bakin's nonsensical "admission" (in her July 30, 2018 response to the subpoena) that she relied upon the March 7, 2018 video to reduce Cavalero's hours on January 5, 2018, as evidence that Bakin relied upon the video to terminate Cavalero, is too far afield to follow. The General Counsel made a conscious and purposeful decision to put the bare July 30 document in evidence but not to question Bakin about it. By itself, the document is not particularly probative.

The problem for the General Counsel is that Bakin provided a credible and unrebutted rationale for her change in course: her significant medical problems recurred and required her to seek an additional floral designer—she could not do the work herself as planned. Bakin testified that bringing back Cavalero was not an option after his explosive, angry response to his termination. As referenced, above, Bakin's unrebutted testimony is that when he was terminated, Cavalero verbally threatened her, was screaming at her, resisted returning the store's keys, and "[t]old me that he would own my business and own my house."

The record provides no grounds to doubt Bakin's explanation that she changed course and sought to hire a replacement for Cavalero after her medical issues returned.

The General Counsel meets the record evidence not with counterevidence, but with still another demand for an adverse inference, this time a sweeping inference rejecting Bakin's unrebutted testimonial evidence that she decided to replace Cavalero after her medical issues resurfaced. GC Br. at 70-72. However, I reject the General Counsel's demand for such an adverse inference. It is premised on an unproven claim of subpoena noncompliance of exaggerated import. In particular, I do not agree that the record proves that Bakin affirmatively posted a job opening on an internet site after Cavalero was fired and failed to provide such a document to the General Counsel in violation of the subpoena.[23] Nor do I agree that the existence of one March 15 email from Bakin to Stewart asking him to call her to set up job interview proves subpoena noncompliance, given the breadth and vagueness of the subpoena. See, GC Exh. 3, item 7 of Attachment, in light of cases cited in footnote 18, supra. In any event, neither claim provides a basis for a sweeping adverse inference effectively sanctioning the Respondent on a key issue in the case.

Simply put, the General Counsel cannot win this case or paper over the weaknesses in the case based on demands for adverse inferences. *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995) (rejecting use of adverse inferences to fill evidentiary gaps where inferences constitute "virtually the General Counsel's entire case").

Overall, it seems clear to me that Bakin's anger with employees, and with Cavalero in particular, did play a role in her decision to let him go. Bakin had a lot of anger and frustration—that is clear from the record. Employees testified that for many months before the reduction in hours or discharge, Cavalero particularly was a subject of Bakin's ire. Cavalero's discharge was not purely a "lack of work" layoff, and Bakin was clear about that as early as March 20, when she responded to State unemployment insurance inquiries. But the point is that the touchstone is whether Bakin's adverse actions against Cavalero were motivated by protected and concerted activity. On that, the evidence is lacking. I find that the General Counsel has failed to meet the initial *Wright Line* burden. Assuming arguendo that the initial *Wright Line* burden has been met, then the Respondent has explained the discharge in a fashion that proves it would have terminated Cavalero even in the absence of his cooperation with the Board's investigation into the Vaughn case.

[23]Bakin testified that she did not post a job but instead searched the website to see who was available and contacted potential candidates including Stewart. Stewart's testimony suggests that he answered a posting for the position, but Stewart was also unsure whether his resume would be available to employers searching the web site. I consider Stewart's testimony too unsure to stand as proof—for purposes of subpoena noncompliance—that, contrary to Bakin's testimony, there was an internet ad placed by Bakin.

The 8(a)(1) allegations

As an alternative theory of violation, the General Counsel contends that Cavalero's January 2018 reduction in hours and March 2018 termination were motivated by his protected and concerted activity. Specifically, the General Counsel contends that Cavalero's explosive argument with Bakin on October 20, 2018, constituted protected and concerted activity. The General Counsel also contends that Cavalero's discussions after October 20, 2018, with co-employee Gratzer, about Bakin and her treatment of employees, constituted protected and concerted activity.

I will assume without deciding that Cavalero's screaming match with Bakin on October 20 constituted concerted and protected activity, although that is far from obvious.[24]

I also agree that Cavalero's discussions with Gratzer about Bakin constitute protected and concerted activity. However, contrary to the General Counsel, I do not agree that there is any evidence or basis for an inference that Bakin was aware of the Cavalero/Gratzer discussions.

The unambiguous testimony is that no employee discussed these matters with Bakin. Cavalero did not, and never saw another employee doing it either. Gratzer did not. As Vaughn testified, with regard to similar employee conversations before October 20, while these conversations may have occurred while Bakin was in the store, they did not have these discussions when she was in the room. Indeed, avoiding Bakin was one of the reasons for the discussions. The General Counsel's assumption that Bakin overheard the discussions about her is at odds with the entire theory of the case. The employees avoided talking to Bakin about the concerns because they feared talking to Bakin about these issues. That was the point. Nothing in the record supports the conclusion that Bakin knew about the employees' protected activity of talking among themselves about their frustrations with her management style.

The General Counsel invokes (GC Br. at 92) the "small plant" doctrine as a basis for concluding that Bakin had knowledge of the employees' protected activity, but that is unavailing on this record. While, the Board has held that knowledge of employees' union activity can be implied where a facility is small, open, and the employees make no great effort to conceal their union conversations from management personnel in the vicinity, "the small plant doctrine is an application of circumstantial evidence":

> The mere fact that an employer's plant is of a small size does not permit a finding that the employer had knowledge of the union activities of specific employees, absent supporting evidence that the union activities were carried on in such a manner, or at times that in the normal course of events, the employer must have known about them.

Sacramento Recycling, 345 NLRB 564, 575 (2005).

Here, there were no papers, no union cards, no petitions, nothing but employee discussions among themselves. Nothing about the conversations would have stood out. There

[24]The General Counsel's position is that since Vaughn and Cavalero had previously discussed among themselves their dislike for Bakin's ill temper, Cavalero's screaming at Bakin when she expressed anger toward them for talking, instead of following her directions, constituted protected and concerted activity on his part.

was no "buzz" (as there might be, for example, if employees in a small shop begin a union drive). The conversations here were informal, interspersed with and part of routine and nonprotected discussions engaged in by employees. There is no basis for concluding that Bakin knew about the employees' protected activities, particularly where the substance of the protected conversations alleged by the General Counsel were the employee discussions about the difficulty of talking to her.

Thus, with regard to the ongoing employee discussions among themselves, I find that the General Counsel has failed to establish the Respondent's knowledge of this protected activity.

As to Cavalero's argument with Bakin on October 20, 2018, assuming, arguendo, that this was protected and concerted activity, I believe that the General Counsel has failed to establish that it was a motivating cause for the January 5, 2018 reduction-in-hours, much less the March 9 termination. It does not make too much sense to conclude that after her angry argument with Cavalero on October 20, 2018, Bakin waited until January 5, 2018, and reduced Cavalero's hours by one day a week in retaliation. It makes even less sense to conclude that in retaliation for the October 20 incident Bakin terminated Cavalero on March 9.

The only animus on the record at any time before Cavalero's termination was Bakin's December interrogation of Chisholm. I do not believe the record supports the conclusion that this inquiry by Bakin, unlawful though it may have been, adds evidence of Bakin's hostility to Cavalero's 8(a)(1) alleged protected activity of arguing with Bakin on October 20, or reasonably leads to the conclusion that Bakin decided to reduce Cavalero's hours, or subsequently discharge him based on the screaming match she had with Cavalero on October 20. Further, I reject the General Counsel's reiteration of the same claims of pretext that advanced and rejected with regard to the 8(a)(4) allegation.

However, even if I assumed, arguendo, that the unlawful interrogation established sufficient animus to satisfy the General Counsel's *Wright Line* burden in the 8(a)(1) case, I would find, for essentially the reasons stated above with regard to the 8(a)(4), that the Respondent has met its burden to prove that, as to any unlawful motive to reduce hours and/or discharge Cavalero based on his October 20 conduct, that it would have taken the same action in the absence of that protected activity.

CONCLUSIONS OF LAW

1. The Respondent Parkway Florist is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. On or about December 15, 2017, the Respondent violated Section 8(a)(1) of the Act by coercively interrogating an employee concerning her participation and the participation of other employees in a Board investigation.

3. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 15, 2017. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Parkway Florist, Inc., Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their participation and the participation of other employees in a Board investigation.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(b) Within 14 days after service by the Region, post at its facility in Pittsburgh, Pennsylvania copies of the attached notice marked "Appendix."[26] Copies of the

[25]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

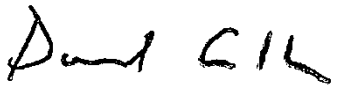
[26]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 15, 2017.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 12, 2018



David I. Goldman
U.S. Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your participation or the participation of other employees in a Board investigation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

PARKWAY FLORIST, INC.

(Employer)

Dated _____ By _____

(Representative)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

William S. Moorhead Federal Building, Room 904, Pittsburgh, PA 15222-4111
(412) 395-4400, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/06-CA-209583 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (412) 690-7117.